## IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JERONIMO DIAZ MOLINA,		)	
	Petitioner,	)	
v.		)	1:15CV395
FRANK PERRY,		)	
	Respondent	. )	

## ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner, a prisoner of the State of North Carolina, submitted a petition under 28 U.S.C. § 2254 for a writ of habeas corpus by a person in state custody, together with an application to proceed *in forma pauperis*. For the following reason, the Petition cannot be further processed.

1. Petitioner indicates that he did not exhaust his state court remedies as required by 28 U.S.C. § 2254(b). This Court cannot grant relief unless Petitioner first exhausts any state court remedies. Id. In North Carolina, a petitioner may satisfy the exhaustion requirement of § 2254 by raising his claim(s) in a direct appeal of his conviction and/or sentence to the North Carolina Court of Appeals followed by a petition to the Supreme Court of North Carolina for discretionary review, or by raising his claims in a Motion for Appropriate Relief ("MAR") and petitioning the North Carolina Court of Appeals for a writ of certiorari if the MAR is denied. See Lassiter v. Lewis, No. 5:11HC2082D, 2012 WL 1965434, at \*4-5 (E.D.N.C. May 31, 2012) (unpublished) (citing O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999), and N.C. Gen. Stat. §§ 7A–31, 15A–1422).

Because of this pleading failure, the Petition should be filed and then dismissed, without prejudice to Petitioner filing a new petition on the proper habeas corpus forms with

the \$5.00 filing fee, or a completed application to proceed *in forma pauperis*, and otherwise

correcting the defect noted. The Court has no authority to toll the statute of limitation,

therefore it continues to run, and Petitioner must act quickly if he wishes to pursue this

petition. See Spencer v. Sutton, 239 F.3d 626 (4th Cir. 2001). To further aid Petitioner, the

Clerk is instructed to send Petitioner a new application to proceed in forma pauperis, new

§ 2254 forms, and instructions for filing a § 2254 petition, which Petitioner should follow.

In forma pauperis status will be granted for the sole purpose of entering this Order

and Recommendation.

IT IS THEREFORE ORDERED that in forma pauperis status is granted for the sole

purpose of entering this Order and Recommendation. The Clerk is instructed to send

Petitioner § 2254 forms, instructions, and a current application to proceed in forma pauperis.

IT IS RECOMMENDED that this action be filed, but then dismissed sua sponte

without prejudice to Petitioner filing a new petition which corrects the defect of the current

Petition.

This, the 19th day of May, 2015.

/s/ L. Patrick Auld

L. Patrick Auld

**United States Magistrate Judge** 

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